

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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AUG 12 2003

PEOPLE OF THE STATE OF ILLINOIS, )  
)  
Complainant, )  
)  
-vs- )  
)  
RIVERDALE RECYCLING, INC., )  
an Illinois corporation, and )  
TRI-STATE DISPOSAL, INC., )  
an Illinois corporation, )  
)  
Respondents. )

STATE OF ILLINOIS  
*Pollution Control Board*  
No. PCB 03 - 73  
(Enforcement)

TO: Mr. Mark La Rose  
Ms. Clarissa C. Grayson  
Attorneys at Law  
734 North Wells Street  
Chicago, IL 60610

Mr. Brad Halloran  
Hearing Officer  
Pollution Control Board  
100 W. Randolph, Ste. 11-500  
Chicago, IL 60601

Ms. Dorothy Gunn, Clerk, Illinois Pollution Control Board  
100 W. Randolph, Ste. 11-500, Chicago, IL 60601

NOTICE OF FILING

PLEASE TAKE NOTICE that we have today, August 12, 2003 filed an original and nine copies of COMPLAINANT'S MOTION TO DISMISS AFFIRMATIVE DEFENSES with Ms. Dorothy Gunn, Clerk of the Illinois Pollution Control Board, 100 W. Randolph, Suite 11-500, Chicago, IL. 60601, a copy of which is attached herewith and served upon you.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS

LISA MADIGAN  
Attorney General of the  
State of Illinois

BY: *Paula Becker Wheeler*  
PAULA BECKER WHEELER  
Assistant Attorney General  
Environmental Bureau  
188 W. Randolph St., 20<sup>th</sup> Flr.  
Chicago, IL 60601  
(312) 814-1511

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PCB No. 03-73  
(Enforcement) STATE OF ILLINOIS  
Pollution Control Board

MOTION TO DISMISS AFFIRMATIVE DEFENSES

Now comes Complainant, PEOPLE OF THE STATE OF ILLINOIS, by LISA MADIGAN, Attorney General of the State of Illinois, pursuant to Section 101.506 of the Illinois Pollution Control Board's Procedural Regulations and Section 2-615 of the Illinois Code of Civil Procedure, 735 ILCS 2-615 (2002), for an order dismissing, with prejudice, Respondents', RIVERDALE RECYCLING, INC. and TRI-STATE DISPOSAL, INC., affirmative defenses to the Complaint.

INTRODUCTION

On November 19, 2002, Complainant, People of the State of Illinois ("State"), filed a two-count complaint against Respondents, RIVERDALE RECYCLING, INC. and TRI-STATE DISPOSAL, INC. ("Respondents"). The complaint alleges Respondents committed violations of the Illinois Environmental Protection Act ("Act"), 415 ILCS 5/1 et seq. (2002), and regulations thereunder.

Count I is titled *Open Dumping of Waste* and Count II is titled *Conducting a Waste Storage Operation Without a Permit*. On July 11, 2003, Respondents filed their Answer and Affirmative Defenses.

## STANDARD

The Illinois Pollution Control Board's procedural rules provide that "any facts constituting an affirmative defense must be plainly set forth before hearing in the answer or in a supplemental answer, unless the affirmative defense could not have been known before hearing." 35 Ill. Adm. Code 103.204(d). In a valid affirmative defense, the respondent alleges "new facts or arguments that, if true, will defeat ... the government's claim even if all allegations in the complaint are true." *People v. Community Landfill Co.*, PCB 97-193, slip op. at 3 (Aug. 6, 1998). The Illinois Pollution Control Board ("Board") has also defined an affirmative defense as a "response to a plaintiff's claim which attacks the plaintiff's legal right to bring an action, as opposed to attacking the truth of claim." *Farmer's State Bank v. Phillips Petroleum Co.*, PCB 97-100, slip op. at 2 n. 1 (Jan. 23, 1997) (quoting Black's Law Dictionary). Furthermore, if the pleading does not admit the opposing party's claim, but instead attacks the sufficiency of that claim, it is not an affirmative defense. *Warner Agency v. Doyle*, 121 Ill. App. 3d 219, 221, 459 N.E.2d 663, 635 (4th Dist. 1984).

## ARGUMENT SECTION 22.38

### **1<sup>st</sup> General Affirmative Defense to all Counts**

Respondents raise this affirmative defense to all Counts stating they are in compliance with the Act having acted in accordance with Section 22.38 of the Act, 415 ILCS 2/22.38 (2002). However, this affirmative defense contains only this broad assertion without

supporting facts and as such falls well short of the standard required by the Board.

To gain safe harbor under Section 22.38 of the Act, much more is required. These requirements include *inter alia*: (1) the facility accept exclusively general construction or demolition debris, (2) within 48 hours of the receipt of the debris that they be sorted, (3) that the debris be transported off-site within 72 hours, (4) that all the sources and transporters of the accepted materials are identified, (5) access to the facility is controlled, and (6) proper documentation and record keeping is provided to the Illinois Environmental Protection Agency ("Illinois EPA").

As stated above, in a valid affirmative defense, the respondent alleges "new facts or arguments that, if true, will defeat ... the government's claim even if all allegations in the complaint are true." *People v. Community Landfill Co.* at 3. Respondents do not allege that they have complied with a single one of the over eleven requirements needed to come into compliance with Section 22.38 of the Act. Respondents merely state, in abbreviated fashion, that "The waste observed...outside the permitted area was general construction and demolition debris which is authorized for storage without a permit pursuant to Section 22.38 of the Act" and, "Respondents are therefore in compliance with the Act pursuant to Section 22.38." (Ans. at 9-10, internal citations omitted).

In raising this defense, Respondents have simply named a section of the Act then asserted safe harbor under its provisions, which they neglect to even mention. Nowhere in Respondent's 1<sup>st</sup> Affirmative

Defense is any mention of the particulars of Section 22.38 of the Act or that Respondent's have been or are currently in compliance with Section of the Act. As such, this affirmative clearly falls below the Boards standard of "new facts or arguments" as laid out in *Community Landfill Co. Id.* Rather Respondents 1<sup>st</sup> Affirmative Defense sets forth a two sentence legal assertion, failing to set forth or even mention key elements of the affirmative defense Respondent is attempting to employ. As such, the defense fails to specify facts or arguments required for pleading a claim or a defense, and should be dismissed.

#### Reliance on State Agents

#### 2<sup>nd</sup> General Affirmative Defense to All Counts

The next affirmative defense asserted by Respondents is somewhat puzzling. In two more abbreviated sentences, Respondents allege they were informed of the presence of Section 22.38 of the Act by two agents of the Illinois EPA, Cliff Gould and James Haennicke. The first sentence goes on to state the Illinois EPA agents explained that this statute would permit certain types of wastes to be stored onsite as long as certain procedures follow and certain notice given. The second abbreviated sentence appears to state that through the mere knowledge of this statute, Respondents have somehow managed to magically come into compliance with this section even though, as discussed early, compliance with this Section requires a number of affirmative steps. Respondents have not alleged they have taken any of the steps required by Section 22.38.

Further asserting this alleged compliance, Respondents state that

such compliance was "undertaken in a manner specially suggested and approved by personnel in the Agency's enforcement division." Ans. At 10. Complainant is unsure as to the meaning of this allegation. While the State acknowledges the possibility that its agents may have mentioned and provided Respondents with a copy of Section 22.38, the approval portion of this statement remains a mystery. Are Respondents alleging that such approval came from the state agents, stating this section of the Act was an acceptable way to achieve compliance, or is Respondent alleging that such approval came from the Illinois EPA itself, as required by the statute?

As discussed above, the Board has stated that in a valid affirmative defense, the respondent alleges "new facts or arguments that, if true, will defeat ... the government's claim even if all allegations in the complaint are true." *Community Landfill Co.* at 3. The Respondents, in this 2<sup>nd</sup> General Affirmative Defense, do not meet this definition imposed by the Board. The affirmative defense contains no new facts or arguments. Respondents merely allege they gained the knowledge of a certain section of the Code and through virtue of this knowledge, they are in compliance. This is not an argument, rather it is a statement of a fact, as there is certainly nothing "new" about the existence of Section 22.38, followed by an declaration of Respondents' innocence. This certainly does not rise to the level of a "new fact or argument" and as a result this affirmative defense should be dismissed.

For the sake of argument, if one assumes that this 2<sup>nd</sup> affirmative defense is adequately pled, it appears that the Respondents are

actually attempting to mount a defense of estoppel. By employing a defense of estoppel, Respondents would essentially be trying to equitably estop the Complainant from enforcing its own laws because of representations made by its agents. However, the defense of equitable estoppel must be specifically pleaded or it is waived. *Hubble v. O'Connor*, 291 Ill.App.3d 974, 684 N.E.2d 816, 823 (1st Dist. 1997); *Dayan v. McDonald's Corporation*, 125 Ill.App.3d 972, 466 N.E.2d 958, 977 (1st Dist. 1984).

The elements of the defense are: 1) words or conduct by the plaintiff amounting to a misrepresentation or concealment of material facts; 2) the plaintiff must have had knowledge at the time the representations were made that they were untrue; 3) the defendant must not have known the truth respecting the representations when the representations were made and acted on by the defendant; 4) the plaintiff must intend or reasonably expect that its conduct or representations will be acted upon by the defendant; 5) the defendant must have in good faith relied upon the misrepresentation to its detriment; and 6) the defendant must be prejudiced if the plaintiff is permitted to deny the truth of the representations or conduct. *Vaughn v. Speaker*, 126 Ill.2d 150, 533 N.E.2d 885, 890 (1989); *Elson v. State Farm Fire and Casualty Company*, 295 Ill.App.3d 1, 691 N.E.2d 807, 817 (1st Dist. 1998).

Additionally, Respondents must plead exceptional circumstances before the doctrine can be invoked against a public body. *People ex rel. Brown v. State Troopers Lodge No. 41*, 7 Ill.App.3d 98, 104-105, 286 N.E.2d 524, 528-529 (4th Dist. 1972); *Monarch Gas v. Illinois*

*Commerce Commission*, 51 Ill.App.3d 892, 898, 366 N.E.2d 945 (5th Dist. 1977). Respondents have neglected to plead any elements or circumstances at all in their affirmative defense. Once again, it can be seen that Respondent's purported affirmative defense is insufficient as a matter of law and should be dismissed.

CONCLUSION

For the foregoing reasons, the Complainant respectfully requests that Respondents' affirmative defenses be dismissed, with prejudice.

PEOPLE OF THE STATE OF ILLINOIS,

LISA MADIGAN, Attorney  
General of the State of Illinois

By: Paula Becker Wheeler

PAULA BECKER WHEELER  
Assistant Attorney General  
Attorney for Complainant

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CERTIFICATE OF SERVICE

I, PAULA BECKER WHEELER, an attorney, do certify that I caused to be served this 12th day of August, 2003, the foregoing Complainant's Motion to Dismiss Affirmative Defenses and Notice of Filing upon the persons listed on said Notice, by placing the same in the U.S. Mail, postage prepaid, at 188 W. Randolph, Chicago, IL 60601.

Paula Becker Wheeler

PAULA BECKER WHEELER